SUPREME COURT, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1966

No. 399

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR PETITIONERS

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Constitution and Statutory Provisions Involved 2

Questions Presented for Review 3

Statement of the Case 3

The Complaint 3

Summary of Facts 4

Presentation of Federal Questions in State Courts 10

POINT I

Petitioners were convicted for matters not charged in the complaint in violation of their right to due process of law as guaranteed by the Fourteenth Amendment 12

POINT II

Petitioners' convictions violated their freedom of expression as guaranteed to them by the Fourteenth Amendment 15

POINT III

The statute [Penal Law §722, subds. 2, 3, and 4] is so vague as applied here that it violates the guarantee of due process of law under the Fourteenth Amendment 17

CONCLUSION 19

Table of Authorities

PAGE

Cases:

Adderley v. Florida, 385 U. S. 39 ..... 15, 18
Ashton v. Kentucky, 284 U. S. 195 14

Baggett v. Bullitt, 377 U. S. 360 17
Brown v. Louisiana, 383 U. S. 131 ..... 14, 15
Burstyn v. Wilson, 343 U. S. 495 17

DeJonge v. Oregon, 299 U. S. 353 14

Cantwell v. Connecticut, 310 U. S. 296 18
Cole v. Arkansas, 333 U. S. 196 14
Cox v. Louisiana, 379 U. S. 536 ..... 14, 16, 17, 18

Edwards v. South Carolina, 372 U. S. 229 ..... 7, 11, 14, 15, 16, 17, 18

Feiner v. New York, 340 U. S. 315 16

Garner v. Louisiana, 368 U. S. 157 14

Henry v. City of Rock Hill, 376 U. S. 776 ..... 17, 18

Keyishian v. Board of Regents, 385 U. S. —— 18

People v. Penn, 16 N. Y. 2d 581, cert. den. 383 U. S. 969 17

Thompson v. Louisville, 362 U. S. 199 14

Shuttlesworth v. Birmingham, 382 U. S. 86 17
Spevack v. Klein, decided January 16, 1967, slip opinion p. 6 14

Winters v. New York, 333 U. S. 507 17

PAGE

United States Constitution:

First Amendment 14, 18

Fourteenth Amendment 2, 3, 10, 11, 12, 15

Statutes:

28 U. S. C., Section 1257(3) 2

New York Penal Code, Section 722, subds. 2, 3 and 4 ..... 2, 3, 10, 17

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Opinions Below

No opinion was written in the Criminal Court of the City of New York (R. 283). The opinions of the Appellate Term (R. 284-314) are reported in 48 Misc. 2d 611, 26 N. Y. Supp. 2d 841. No opinion was written by the Court of Appeals, but its decision is reported in 17 N. Y. 2d 829, 271 N. Y. Supp. 2d 274, and its amendment of its remittitur in 18 N. Y. 2d 683, 273 N. Y. Supp. 2d 431.

Jurisdiction

The judgment of the New York Court of Appeals was entered on June 2, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

Constitution and Statutory Provisions Involved

The Constitutional provision is the due process clause of the Fourteenth Amendment.

The statute is Section 722 subds. 2, 3 and 4 of the New York Penal Law:

"Disorderly Conduct.

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: * * *

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;

"4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd; * * *".

Questions Presented for Review

1. Whether the petitioners were convicted without the due process of law guaranteed by the Fourteenth Amendment because they were convicted without notice of the charges against them.

2. Whether petitioners' convictions for holding a street meeting to peacefully express political dissent violate the guarantees of freedom of speech and assembly embodied in the due process guarantee of the Fourteenth Amendment.

3. Whether subdivisions 2, 3, and 4 of Section 722 of the Penal Law of New York State, under which petitioners were convicted, are so vague and uncertain as applied to street meetings that they violate the due process guarantee of the Fourteenth Amendment.

Statement of the Case

The Complaint

The complaint against petitioners in the Criminal Court of the City of New York charged that "at 4.25 p.m. on August 8, 1964, vicinity Duffy Square—47 St. and B'way . . . . the defendants did unlawfully congregate and assemble at the above location obstructing the area to the exclusion of those wishing to use same, and did delay vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; when ordered to move on the defendants did fail to do so after being informed that their actions were not lawful"; and that defendants thereby violated Section 722, subdivisions 2, 3 and 4 of the Penal Law of the State of New York (R. 1).

Summary of Facts

According to the undisputed evidence, the street meeting leading to petitioners' convictions was held to protest the American policy in the Vietnam war, under the auspices of a group called the "May 2nd Movement", which had been formed a few months previously at Yale University (R. 125, 168, 284). Duffy Square, where the meeting was held on a Saturday afternoon at about 4 o'clock, is a triangular area in midtown Manhattan, extending the length of one block, from 46th to 47th Streets. Towards both the 46th and 47th Street ends are statues, hedges, and railings; the large paved center section is unused and unbroken save for a subway grating (R. 138). Pedestrian traffic to and from the Square is permitted only at crosswalks at the 46th and 47th Street extremities, well-separated from the open center section by the statuary and fixtures.[1]

The speakers at the meeting stood on the steps leading to a statue of Father Duffy towards the northern end of the Square, with the audience in the center section (R. 148, 149). Petitioners offered to prove that meetings for various causes such as bond rallies have been held in that section (R. 138, 139).

The People introduced a tape recording (R. 31, 32) according to which one of the petitioners, acting as chairman, began the meeting, stating that "under the auspices of the May 2nd Movement we are here to have a peaceful meeting" (R. 35). After only a few minutes of speeches about the war in Vietnam (R. 36), a police captain ap-

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[1] A photograph of Duffy Square was introduced in evidence as People's Exhibit 1 (R. 6); a similar photograph is reproduced in the record (R. 7).

proached the speakers and ordered them to disperse the assembly (R. 37). The chairman declared that the meeting should be allowed to proceed (R. 36, 37); the captain withdrew while the speeches continued; he returned after a few moments; he repeated his order and the chairman repeated his reply (R. 37, 38). The police captain apparently had arranged for the physical dispersion of the meeting: suddenly, two policemen on horseback rode into the center of the Square where the audience was standing, to force its dispersion, accompanied by approximately a dozen foot patrolmen (R. 38, 43, 44, 47). As a chief prosecution witness testified: "... then the horses came on behind the foot patrolmen . . . That's when everybody started shouting and yelling and running" (R. 38, 39). The petitioners tried to avoid the horses and to continue the meeting for some minutes until the police stated they were under arrest.

There was evidence that the police had pre-determined to break up the meeting (on the basis of a police policy later abandoned, and never acknowledged in court, to prohibit meetings for political dissent throughout a large area, regardless of traffic conditions) (R. 144, 200). Nevertheless, the prosecution attempted to prove, in an effort to justify the dispersal order, that the meeting was interfering with pedestrian and vehicular traffic.[2]

The only entirely disinterested witness to the meeting was a reporter from *The New York Times*, who was unacquainted with petitioners and was present solely in a rep-

[2] One police officer testified that he heard the Captain give this as a reason (R. 9). But neither the Captain nor the Inspector who accompanied him (R. 8) testified (R. ii). Nor were the Captain's remarks reproduced on the tape that was played (see R. 37). On the other hand, the only disinterested witness testified that the Captain had not referred to traffic in his order (R. 151, 153, 159).

ortorial capacity, called by the defense (R. 147, 148). Although other newsmen also attended the meeting (R. 148), the prosecution called only the participating policemen, its chief witnesses being two officers attached to the Police Department's Bureau of Special Services, who had had the speakers and previous meetings under surveillance (R. ii, 4, 5).

The *New York Times* reporter testified that the meeting was peaceful, orderly, small relative to the size of the center area of the Square where it was held, and not "attracting very much attention at all" until the advent of the horses (R. 148, 151, 161). Since the center section of the Square concededly was large enough to accommodate many more than the audience at its maximum estimate,[3] the prosecution contention was that the audience pressed forward towards the Father Duffy statue to hear the speakers; that consequently a few of the auditors stood in the gutter and the audience filled the Square from curb to curb, at a point near the speakers; that pedestrians walking north to south or vice versa therefore had to walk in the gutter at this point; and because of the people in the street that the automobiles had to "veer" from one lane to another in the adjacent broad avenues (each having a number of traffic lanes) (R. 11, 12, 16, 17, 92, 93).

Even if the truth of this testimony is assumed—despite its overall contradiction by the *Times* reporter and numerous indications that it was contrived to fit the claim that the dispersal order was based on traffic conditions rather than pre-determined—the police captain admittedly gave

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[3] Estimates of the number in the audience varied from 60 by *The New York Times* reporter, to 200 by the chief prosecution witness (R. 150, 11).

no suggestion or order that the audience narrow itself in the Square as an alternative to dispersal. Further, the maximum inconvenience possible for pedestrians from the alleged curb-to-curb audience, was that they would have been forced to use the cross-walk at one end of the Square instead of proceeding to that at the other.

As to the conduct of the audience during the speeches, before the dispersal order, there was occasional handclapping (R. 36, 37) and according to the *Times* reporter "ordinary cheering . . . not particularly restrained, but I would not say it was a ruckus, or shrill, or anything like that" (R. 150, 151).[4]

The prosecution testimony that thousands of pedestrians on the sidewalks facing the Square stopped to look at the meeting (R. 108, 109) is wholly incredible, considering the *Times* reporter's testimony that the meeting attracted little attention and considering that it was uneventful prior to the advent of the horses. The Appellate Term opinion seems to assume that this prosecution testimony referred to the period after the order to disperse (R. 286). In any event, even if such an occurrence could be relevant to petitioners' convictions,[5] there is no indication that the alleged viewing of the meeting caused or threatened any obstruction or disturbance.

Most of the prosecution evidence related to the acts of individual petitioners in the period of the police effort to

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[4] One of the Bureau of Special Services policemen testified that before the meeting began a group of unspecified size chanted " 'Down with American imperialism' and 'Stop the war in Vietnam' and things of that nature" (R. 108). However, there was no indication that the alleged chant could be considered a disturbance of the peace.

[5] See *Edwards* v. *South Carolina*, 372 U. S. 229, 237.

physically disperse them, between the advent of the horses into the Square and petitioners' arrests. Nine of the prosecution's eleven witnesses were policemen who had come to the Square only at the time of the dispersal order, each testifying as to additional individual acts.[6] There was no evidence of acts of violence, profanity or obscenity by petitioners, their most opprobrious term being "fascist police" or "fascist cop" as the policemen tried to drive them off the Square. While the policemen described petitioners as running around in the Square and "screaming", their "screaming" consisted mainly of declarations and calls to each other, as they scattered to avoid the horses, as to their right to continue the meeting (e.g., R. 45-48, 52, 53). They submitted to arrest as soon as the police sought to arrest them. For example, the officer who arrested petitioner Rhoads testified:

> "There was a melee in Duffy Square itself and everybody was running around yelling 'fascist cops' and this and that and I observed Rhoads running towards the steps of the Square itself and I followed him up and told him he would have to leave the Square. If he didn't, he would have to be placed under arrest because he was part of the general disturbance there and he said he didn't want to leave and I told him if he didn't leave the second time I was going to place him under arrest and I placed him under arrest and I took him down from the center of Duffy Square by the monument there" (R. 60).

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[6] None of these acts were included in the charges, and the evidence thereof should have been excluded in response to petitioners' due process objection (see *infra*).

Similarly the officer who arrested petitioner Gelles testified:

> "I said, 'Please move along. You are not accomplishing anything by standing here.' Again he ranted, 'You can't tell me what to do. I have my rights.' I said, 'Mister, I am going to arrest you if you don't move on', and he said, 'Go ahead and arrest me.' . . . Q. All right, what happened then? A. I informed him I placed him under arrest and walked across in front of the Square, which would be the south of the Square, and placed him in a cab" (R. 83).

The policemen emphasized that petitioner Maher hit one of the police horses with a rolled-up cardboard placard (R. 99). Mr. Maher testified without contradiction that he was attempting to keep the horse from trampling on another young man who had stumbled and was lying near the horse's feet (R. 168, 169). None of the petitioners had or used any type of implement other than Mr. Maher's use of the rolled placard (see R. 156).[7]

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[7] Several policemen claimed that petitioners Kunis and Eckhardt, who worked together as puppeteers and brought with them a puppet symbolizing anti-militarism, ran into the street after the order to disperse and lay down in the middle of Broadway (R. 56, 57, 74, 75). The petitioners testified that Kunis lay on the sidewalk and entirely denied the allegation as to Eckhardt (R. 186, 187, 207, 215, 216, 223-25). The *Times* reporter testified that he was "not sure if it was on the street or sidewalk" that he saw a person lying (R. 161).

Presentation of Federal Questions in State Courts

The amended remittitur of the New York Court of Appeals, the State court of last resort, states: "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, as follows: Appellants contended that (1) their convictions violated the due process guarantee of the Fourteenth Amendment because they were based in whole or part on acts which were not charged in the complaint; (2) their convictions violated their Constitutional rights of free speech and free assembly, and (3) their convictions under subdivisions 2, 3 and 4 of section 722 of the Penal Law violated the due process guarantee of the Fourteenth Amendment because of vagueness. The Court of Appeals held that appellants' Constitutional rights were in no way violated" (R. 320). The points listed by the Court were presented to it in petitioners' briefs and oral argument.

As to the lower State courts, the first point presented to this Court for review—that petitioners were convicted for acts that had not been charged against them—was raised repeatedly in objections to the introduction of evidence in the trial court (R. 19, 28). Specifically petitioners' attorney objected

> "to any testimony as to the occurrences after Captain McAllister attempted to disperse this meeting, on the grounds that they are not within the allegations of the complaint. It would be a violation of due process to try people on charges which have not been alleged and which they have not had notice and are not included in the sworn complaints . . . " (R. 60, 61).

And in argument to the trial court at the conclusion of the trial, counsel stated:

> "Again, at the risk of repetition, I want to say that the complaint is obviously based on the conduct of the whole group. There is no implication in these charges whatsoever, that there would be any attempt to prove . . . or that there would be any evidence about individual physical acts, as to which testimony has been admitted; . . . therefore there can be no conviction based on those acts consistent with due process of law" (R. 265).

In the lower appellate court, the Appellate Term of the Supreme Court of the State of New York (hereinafter called Appellate Term), petitioners' briefs presented the point as a matter of State and Federal due process. One judge rejected it (R. 294); one judge may or may not have considered it (R. 308); and the dissenting judge accepted this Constitutional argument, relying on the decisions of this Court as to Federal due process (R. 312).

The second question presented for review here—that the convictions violate the guarantees of freedom of speech and assembly—was argued to the trial court. Petitioners' attorney asserted that "conviction on the evidence that has been presented would violate the State and Federal constitutional guarantees of free speech and free assembly" (R. 258) and quoted at length from this Court's decisions under the Fourteenth Amendment, in particular *Edwards* v. *South Carolina,* 372 U. S. 229 (R. 263). The Federal Constitutional point was presented in brief and oral argument to the Appellate Term; the Court's opinion explicitly

rejected it (R. 300, 301) and the dissenting opinion explicitly accepted it (R. 310-12).

The third Constitutional question, as to the vagueness of the statute, was presented by brief in the Appellate Term, which rejected it (R. 293-94).

POINT I

Petitioners were convicted for matters not charged in the complaint in violation of their right to due process of law as guaranteed by the Fourteenth Amendment.

The complaint, as already noted, charged petitioners with "intent to provoke a breach of the peace" by unlawfully assembling, obstructing traffic, using loud and boisterous conduct and causing a crowd to collect and refusing to move on after being informed that their actions were "not lawful" (R. 1).

There is no basis for the statement by the majority in the Appellate Term (R. 294) that the complaint (R. 1) justified charges based on conduct after the order other than the mere failure to obey it. It is clear that the gravamen of the complaint is that petitioners were conducting an unlawful meeting—unlawful because they obstructed traffic, caused a crowd to collect and used boisterous language, and that they were therefore told to move on. Certainly that was no indication that any of them was being charged with any of these matters occurring after the order. The only conduct after the order referred to in the complaint is the failure to move on.

In fact there was no evidence to support the charge that anything occurred which justified a declaration that the

meeting was unlawful. Prior to the police interference there had been no substantial interference with traffic, no loud or boisterous conduct whatever, no undue crowd.

The only testimony about obstruction during the conduct of the meeting was as follows: Officer Behr testified (R. 12) that some people had to walk on the street around the Duffy Square area, that some cars veered to avoid these people, and that some of the demonstrators were also in the street. He made no attempt to be specific other than to say (R. 17) that cars had to switch from one lane to another. He did not claim that the flow of traffic was interfered with. Officer Fahy expressly testified that before the order to disperse was given traffic had not "backed up" (R. 78). The testimony of Officer Walsh that traffic was stalled (R. 92, 93) related to the time after the order to disperse had been given, because he evidently was one of the policemen who arrived for the dispersal (R. 87, 88). No one testified to "boisterous" conduct during the earlier period. And, of course, the charge that a crowd collected is meaningless unless there was other evidence of improper conduct. Certainly there was no basis for a charge that the assembly was unlawful. The order to disperse was, therefore, unlawful—not the meeting.

It is evident, however, from the testimony adduced and the arguments of the District Attorney at the trial that the People based the prosecution on the conduct of petitioners *after* the order to disperse (R. 27). The convictions were affirmed by the Appellate Term on this theory (R. 296, 297). Whatever justification there may have been for proceeding against any individual whose conduct may have been improper, the complaint in this case did not proceed on that basis at all. Had that been done petitioners could have sought separate trials to avoid confusion and preju-

dice.[8] But no distinction was made at this trial between the various individuals. They were unaware of what they were charged with.

The failure of the trial court to limit the evidence to the acts specifically charged in the complaint and its failure to indicate on what basis its judgment rested made it impossible for any appellate court to determine whether the convictions rested on the trial court's belief that the meeting was unlawful or on acts occurring after the order to disperse; impossible to determine which defendant was found guilty for what cause. This alone violated due process. See *Spevack* v. *Klein,* decided January 16, 1967, slip opinion p. 6.

As this Court said in *DeJonge* v. *Oregon,* 299 U. S. 353, at 362, "Conviction upon a charge not made would be a sheer denial of due process." And convictions were set aside for lack of adequate notice of charge in that case and in *Cole* v. *Arkansas,* 333 U. S. 196, *Thompson* v. *Louisville,* 362 U. S. 199, and *Garner* v. *Louisiana,* 368 U. S. 157.

These considerations are further enhanced in view of the fact that First Amendment rights are also involved and that it appears that here, as in *deJonge,* hostility to the purposes of the meeting was a factor.

This Court has been astute to prevent the use of omnibus breach of the peace statutes in aid of deprivation of First Amendment rights: *Edwards* v. *South Carolina,* 372 U. S. 229; *Cox* v. *Louisiana,* 379 U. S. 536; *Ashton* v. *Kentucky,* 284 U. S. 195. Cf. *Brown* v. *Louisiana,* 383 U. S. 131.

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[8] The continued introduction of evidence of what occurred after the order to disperse, the nature of which had not previously been intimated made it impossible for trial counsel to do more than continue to object. There was not even any disclosure in advance by the prosecutor of what acts were charged against which of the defendants. The confusion was complete.

The views expressed by Mr. Justice Hofstadter in his dissent (R. 312, 313) reflect a correct understanding of this Court's views and should receive this Court's approval by a reversal here.

POINT II

Petitioners' convictions violated their freedom of expression as guaranteed to them by the Fourteenth Amendment.

One cannot read the record herein without reaching the conclusion that the police order to disperse, the arrests, and the prosecution were all motivated by hostility to the unpopular views expressed at the meeting. But this Court has been careful to prevent the use of disorderly conduct or breach of the peace charges in such situations.

It is one thing to uphold a conviction under a law punishing trespass with "malicious and mischievous intent" as was done, by a sharply divided Court, in *Adderley* v. *Florida,* 385 U. S. 39; quite another so to treat a conviction under a breach of the peace statute: see *Brown* v. *Louisiana* and *Edwards* v. *South Carolina, supra.* Here there can be little doubt that the statute was used to restrict freedom of expression.

We start with the fact that the first statement made by a police captain (who, significantly, did not testify) indicated a belief that no meeting could be held at that place without permission (R. 9, 126, 151). This is confirmed by the chairman's response, as recorded on the tape (which also, significantly, did not record the captain's order to disperse) that permission was not needed and that those present would "exercise our constitutional rights" (R. 36).

In this connection an offer of proof was made at the trial to show that meetings had been held in Duffy Square for popular causes, such as bond rallies (R. 138, 139).

Any attempt to sustain these convictions on the basis of interference with traffic must founder for lack of opinion by the trial court. For the convictions might well have rested on that court's belief that what occurred after the order to disperse justified them. Moreover, as we have already shown, there was no testimony of substantial interference until the police injected themselves. It should be borne in mind that Duffy Square, as the picture shows (R. 7) is a triangular area largely unused between Seventh Avenue and Broadway. The meeting took place in front of the statue (which appears on the left, or north side, of the picture) (R. 8). The reference by the Appellate Term (R. 301) to this Court's comment in *Cox* v. *Louisiana, supra,* about a meeting "in the middle of Times Square at the rush hour" has no application here. The meeting was several blocks north of Times Square, was not in the middle of the street, and was not in the rush hour.

Even if some demonstrators did overflow the Duffy Square area itself the order to disperse was nevertheless unjustifiable. For if the police had really been concerned with such inconsequential interference with traffic that could have been averted by ordering a slight narrowing of the gathering—and that was not done (R. 14, 15, 112), cf. *Edwards, supra* at p. 232, n. 5.

The reliance (R. 304) in the majority opinion of the Appellate Term, on *Feiner* v. *New York,* 340 U. S. 315, is we submit misplaced. There was here no inflammatory lan-

guage, no open hostility expressed by bystanders, no reason to suppose that a fight might ensue. Nor is *People* v. *Penn,* 16 N. Y. 2d 581, cert. den. 383 U. S. 969 (cited R. 308), relevant. For there defendants had obstructed trucks by lying down in front of them to prevent delivery of the cement they were transporting to a building site.

We submit that the convictions cannot stand consistent with First Amendment principles. Since the order to disperse a peaceful meeting was improper, there can be no punishment for failure to obey it: *Henry* v. *City of Rock Hill,* 376 U. S. 776; *Shuttlesworth* v. *Birmingham,* 382 U. S. 86, and *Cox* and *Edwards, supra.*

POINT III

The statute [Penal Law §722, subds. 2, 3, and 4] is so vague as applied here that it violates the guarantee of due process of law under the Fourteenth Amendment.

The three subdivisions deal with separate matters: 1. annoyance of others; 2. refusal to move when ordered to do so by the police; 3. causing a crowd to collect except when lawfully addressing it.

1. The statute lays down no guide whatever for determining what constitutes the forbidden annoyance. No attempt was made by the majority of the Appellate Term to deal with this issue, although Mr. Justice Hecht did note the difficulty of defining how serious the annoyance must be (R. 296). We submit that under the decisions of this Court in *Winters* v. *New York,* 333 U. S. 507, *Burstyn* v. *Wilson,* 343 U. S. 495, *Baggett* v. *Bullitt,* 377 U. S. 360,

Keyishian v. *Board of Regents*, 385 U. S. ——, no conviction under this subdivision can stand.

2. Certainly not every refusal to move when ordered to do so by a policeman can be punished criminally. Since the statute fails to specify the circumstances under which such failure should be punishable and leaves the freedom of the pedestrian entirely at the mercy of any police officer, it is so broad as to fall within the condemnation of this Court's decisions already cited.

3. Finally, this subdivision begs the basic question: when is a meeting lawful. For nowhere in the law of New York are standards laid down which would determine the legality of street meetings.

* * * * *

In short, not one of these provisions gives adequate notice of what is and what is not criminal conduct. Certainly as applied here to an exercise of the constitutionally protected right to freedom of expression, they cannot be upheld. Not one of these constitutes that "narrowly defined" statute which this Court has held required in First Amendment areas: see *Cantwell* v. *Connecticut*, 310 U. S. 296, at 307; *Cox* v. *Louisiana, supra*, at 562, *Edwards* v. *South Carolina, supra, City of Rock Hill, supra*. See also Mr. Justice Douglas dissenting in *Adderley* v. *Florida*, 385 U. S. 39, at 55.

CONCLUSION

The judgment under review should be reversed and the complaint dismissed.

Respectfully submitted,

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